United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24511

HARRY E. THOMASON,

Appellant

v.

MELVIN R. LAIRD,
Secretary of National
Defense, et al,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT, HARRY E. THOMASON

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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24511

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v.

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STATEMENT OF THE ISSUES, PRESENTED

Whether the District Court erred when it failed to find that the Government was arbitrary, capricious and in violation of applicable procedures in Thomason's efforts for promotion.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Columbia, dismissing a complaint for declaratory judgment to fix the rights of Thomason as they relate to his employment by the United States Government.

REFERENCE TO RULINGS:
Order dismissing complaint, April 3, 1970
Order denying reconsideration, April 8, 1970

Thomason alleged in his complaint, that the Government had acted arbitrarily, capriciously and in violation of applicable procedures, in the course of his efforts to obtain promotion to a GS-14 Patent Attorney position, from a GS-13 Patent Advisor in the Patent Prosecution branch of the Office of the General Counsel, HQ., Army Materiel Command; he complained that an Ad Hoc Committee appointed to compile a list of "best qualified" candidates, had improperly excluded him; that he on April 13, 1967 he filed a Grievance alleging the foregoing; that he was supported by the findings and recommendations of a Grievance Examiner, dated July 14, 1967; that said findings by the Grievance Examiner, showed the following:

1. That contrary to the Ad Hoc Committee's determination, the job was an existing vacancy in the patent prosecution branch, rather than a jew job.

2. That contrary to grievance procedure regulations, Mr. Kelly, appellant's supervisor, failed to have an informal discussion of the problem with Thomason before formal action was indicated.

3. That contrary to regulations, Thomason had not been provided with information from official records bearing on his case.

4. That contrary to regulations, the Ad Hoc Committee had been misled by an unsigned, but derogatory performance rating, when in fact Thomason's performance was found excellent by the Grievance Examiner.

5. That the chairman of the Ad Hoc Committee, was definitely biased against Thomason; that this was a major factor in Thomason's exclusion from the list of candidates.

6. That contrary to regulations, the Ad Hoc Committee, had included a requirement of education beyond that required by the job description for the vacancy, i.e., Chemistry; that Thomason had a degree in Physics.

7. That the man selected by appellant's supervisor, from the list compiled by the Ad Hoc Committee, was a Mr. Gibson, from another branch.

8. That Mr. Gibson was a friend of long standing of the Appellant's supervisor, Mr. Kelly; that Mr. Kelly was the selecting official.

9. That the educational requirement of a degree in Chemistry, gratuitously included by the Ad Hoc Committee, fitted only one man, i.e., the successful candidate, Mr. Gibson.

10. That contrary to the job description requirement of major experience in patent prosecution, Gibson, had very little; that Thomason was abundantly qualified in that respect.

11. That the appointment of Gibson should be cancelled and the whole matter re-processed from the beginning.

12. That contrary to rumor, Thomason's performance, cooperativeness, self-discipline, professional integrity and discretion in personal affirs, was excellent.

By letter dated Oct. 9, 1967, the Commanding General overruled the Grievance Examiner and permitted Gibson to remain in the GS-14 position; he ordered the re-convening of the Ad Hoc Committee for re-consideration of Thomason's application. In the same letter, the appellant was advised, that if the decision was unacceptable to him, that he had the right to seek review by the Chief of Staff, Department of the Army

By letter dated October 19, 1967, Thomason did make such a request for review from the Chief of Staff of the Army. Among other things, Thomason indicated that retention of Gibson as the appointee would preclude proper consideration by the re-convened Committee.

When there was no response to his, Thomason's, appeal to the Army Chief of Staff, the appellant sought out the help of U. S. Senators, Ervin and Jordan. By letter dated November 17, 1967, the said Senators complained to the Secretary of the Army, Resor, that Thomason's appeal was stalled while his Merit Promotion and Grievance Appeal rights were being violated.

By letter dated December 6, 1967, the acting General Counsel advised the Senators that the committee had reconvened, had included Thomason in the list of "best qualified" candidates, but that Gibson had again been selected by Mr. Kelly. Thomason thereafter appealed to the Civil Service Commission by letter dated April 29, 1968, but the Commission refused to act, alleging that it had no jurisdiction.

Thomason filed his complaint in the District Court. The Government moved to dismiss on the alleged grounds of failure to state a claim upon which relief could be granted and lack of jurisdiction of the subject matter. Oral argument was heard by the Court on February 27, 1970. At that time, the Court indicated that it would hold for the Government. Appellant moved for reconsideration which was opposed by the Government. By order dated April 3, 1970, the Court dismissed the complaint and by another order dated April 8, 1970, it denied the motion for reconsideration. Notice of appeal was thereafter timely made on May 28, 1970, to this Court.

A R G U M E N T

The District Court Erred When It Failed To Find That The Government Had Been Arbitrary, Capricious And In Violation Of Applicable Procedures In Thomason's Efforts For Promotion.

The Government had sought to persuade the District Court that it did not have jurisdiction of the subject matter. However, the appellant pointed out that the Court did have such jurisdiction, as a matter of due process of law. Even where the employee was a mere applicant for public employment, as in Scott v

Macy, 121 U.S. App. D.C. 205, 349 F.2d 182 (1965), ". . . he was not without Constitutional protection . . . against arbitrary treatment. . . ". In Garner v. Bd of Public Works, 341 U.S. 716 (1950), the Court held that ". . . because the Constitution does not guarantee a right to public employment, the Government may resort to any scheme for keeping people out of such employment. .". Thus, the fact that Thomason's case involves promotion in employment, does not prevent him from obtaining judicial review of the subject matter. See also Homer v. Richmond, 110 U.S. App. D.C. 226, 229, 292 F.2d 719, 722 (1961).

Appellant further contends that there was unfairness practiced by his agency against him, as well as a violation of applicable procedures. Under paragraph 3-4 of Army Civilian Personnel Regulations E2.3, the following is set out:

> "3-4. If the commanding officer's decision on the grievance is not acceptable to the employee, he may submit through command channels a written request for review of the decision by the major command. . . ".

Thomason, of course did just that, he appealed to the Army Chief of Staff, by his letter of October 19, 1967, in accordance with the above and in further accordance with directions given him by the AMC Commanding General, in the latters note of Oct. 9, 1967. In Camero v. U.S. 375 F.2d (1967), where, just as in the instant case, the Grievance Examiner, had found for the employee, and where, just as here, the appointing authority, on the advice of his general counsel, had overruled the Grievance Examiner and found against the employee, the Court there held that:

> "Failure by the agency to observe procedures, or . . . standards of fairness implicit therein makes the attempted unfavorable resolution of an employee's grievance abortive and of no effect."

See also Knotts v. U.S. 128 Ct.Cl.,121 F.Supp. 630 (1954) and Kelly v. U.S. 138 F.Supp 244, 133 Ct.Cl. 571 (1956).

The unfairness practiced by the agency, in addition to its overruling of its Grievance Examiner's findings and recommendations, included also its retention in the GS-14 job of the original appointee, while ostensibly making an effort to provide Thomason with another opportunity at the job.

It is also believed that the appellant is entitled to review by the Court under Settlers Ins. Co. v. Schweid, 221 A.2d 920 (1966). There the Court held that:

> "Motion to dismiss complaint may not be granted unless it appears as certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in substantiation of claim advanced in complaint."

See also, Molitch v. Baltimore & Ohio RR Co., 176 A2d 300, D. C. Mun.App.; and Frank v. Beana, 64 F.Supp 53, D.C.N.Y.

In oral argument before the District Court, the Court there felt that Thomason had received his procedural rights under Department of the Army General Orders #44. Counsel for the appellant was of the opposite view (p. 18,19, Tr). Thomason contends that he had a right to have his appeal reviewed by the Chief of Staff, and not have it diverted back to the place from whence it came. We do not feel that the Grievance Procedures under CPR E2.3, par. 3-4, supra, are meaningless. If they are as the Court below believes they are, then appeal from the October 9, 1967 decision of the CG AMC, as advised by said authority, should never have been taken. If the Court below is correct, then General Besson should have written to the appellant, that the October 9, 1967 decision was final and that he had no recourse for appeal. Such a result is obviously unreasonable.

CONCLUSION

For all of the foregoing, appellant respectfully requests that the Court find in behalf of his appeal and remand the matter back to the District Court for further proceedings.

Respectfully submitted,

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,511

HARRY E. THOMASON, APPELLANT

v.

MELVIN R. LAIRD, Secretary of Defense, *et al.*, APPELLEES

Appeal from the United States District Court
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THOMAS A. FLANNERY,
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JOHN A. TERRY,
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C.A. No. 2113-69

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ISSUES PRESENTED *

In the opinion of appellees, the following issues are presented:

1. Whether the District Court had jurisdiction over appellant's request for a retroactive promotion.
2. Whether appellees acted arbitrarily and capriciously or violated appellant's due process rights in denying appellant a promotion.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MELVIN R. LAIRD, Secretary of Defense, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On July 28, 1969, appellant, an employee of the United States Government, filed a complaint in the District Court seeking a declaratory judgment which would retroactively award him a promotion. In his complaint he alleged that his due process rights were violated and that appellees [1] acted arbitrarily and capriciously in denying him a pro-

[1] Appellees are Melvin R. Laird, Secretary of Defense; Stanley R. Resor, Secretary of the Army; Robert E. Hampton, Chairman of the United States Civil Service Commission; James E. Johnson, Vice Chairman of the United States Civil Service Commission; and Ludwig J. Andolsek, Member of the United States Civil Service Commission.

motion for which he had applied. Appellees moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief could be granted. On February 27, 1970, oral arguments were presented by both parties before the Honorable Howard F. Corcoran. Appellees' motion to dismiss was granted by order dated April 3, 1970, and appellant's motion for reconsideration was denied on April 8, 1970. This appeal followed.

Appellant alleged in his complaint that he was employed as a patent advisor, grade GS-13, in the patent prosecution branch of the Office of the General Counsel, Headquarters, Army Materiel Command, Department of the Army, as a civilian attorney during the early months of 1967[2] (App. 2).[3] Appellant, among others, sought a promotion to a vacant GS-14 position within the office. Pursuant to regulations, an *ad hoc* committee was convened to select a group of "best qualified" candidates for referral to a selection official. Appellant was not included as one of the "best qualified." After another individual was appointed to fill the vacancy, appellant on April 13, 1967, filed a formal grievance (App. 3-4).

Pursuant to grievance regulations, an examiner was assigned to consider appellant's complaint, and, in a report dated July 14, 1967, the examiner sustained appellant's grievance (App. 4). The report was submitted to the Commanding General of the Army Materiel Command, Frank S. Besson, Jr., who, by letter dated October 9, 1967, overruled the examiner with one exception (App. 5). Appellant appealed General Besson's decision by writing to the Army Chief of Staff on October 19, 1967 (App. 5). In the meantime, General Besson, apparently recognizing that appellant's name should have been included as one "best qualified," convened a new *ad hoc* committee to prepare a new list of names for referral to the selecting official. Appellant's name was on the list

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[2] Appellant apparently remains so employed.

[3] "App." refers to the appendix to appellant's brief.

referred to the selecting official, but again he was not selected (App. 5-6). By letter dated February 19, 1968, Secretary Resor, in response to inquiries from two Senators, stated that appellant's grievance had been removed from the appeal channel to the Chief of Staff and returned to the General Counsel (App. 6). Thereafter, on April 4, 1968, the General Counsel of the Army notified appellant by letter that his appeal had been denied, which position was affirmed by the Army General Counsel by a subsequent letter dated April 19, 1968 (App. 7).

Following the denial of appellant's grievance by the Department of the Army, appellant, by letter dated April 29, 1968, wrote the United States Civil Service Commission requesting their intercession in his behalf. By letter dated July 18, 1968, the Commission refused jurisdiction of the matter (App. 7).

At the hearing on the motion to dismiss, further facts were elicited. General Order No. 44, promulgated by the Secretary of the Army on October 4, 1967,[4] provided that the General Counsel of the Department of the Army was designated as the qualified authority to review all actions pertaining to the promotion of civilian attorneys within the Department of the Army, thereby superseding the appellate procedure previously in operation which established the Chief of Staff as the final authority of review. It further provided that this authority of review could be redelegated upon request to, *inter alios*, General Counsel, Headquarters, Army Materiel Command, whose decision on review in the event of redelegation would be final concerning the specified employees within that command (Tr. 11-13).[5] After the promulgation of General Order No. 44, the General Counsel of the Army implemented that order by a memorandum dated October 25, 1967. The memorandum, in substance, provided for the authority of the General Counsel to review promotions to be

[4] General Order No. 44 is reproduced in its entirety at App. 22.

[5] "Tr." refers to the transcript of the hearing in the District Court on February 27, 1970.

redelegated automatically, without prior request, to, *inter alios*, General Counsel, Headquarters, Army Materiel Command. In essence, then, review no longer was available from either the Chief of Staff or the Army General Counsel but terminated with the General Counsel, Headquarters, Army Materiel Command, for personnel within that command (Tr. 15-16).

After General Besson reconvened an *ad hoc* committee for the purpose of preparing a new referral list, which contained appellant's name, and after the subsequent selection of another for the post, appellant again requested the intervention of General Besson. By letter dated January 11, 1968, General Besson replied:

> In reviewing the judgment exercised in selecting a candidate whose name was on the list of best qualified employees, it was not possible for me to take issue with the selection determination . . . . However, it is clear by virtue of the number of times your problems have come to the attention of my immediate office that the matter of personal relationships is a problem area. Improvement in this area is the primary step on your part to increase your value to the organization and your promotion potential (Tr. 5-6).

After completion of the oral presentations, the court determined that there was nothing it could do concerning the promotion of appellant nor the question of back pay. The court further stated that its review was limited to the question of compliance with procedural regulations, and in the instant case appellant received the benefits of available regulations and the review he sought (Tr. 24). The court thereafter granted appellees' motion to dismiss (Tr. 25).

ARGUMENT

I. The District Court properly granted appellees' motion to dismiss the complaint which requested a retroactive promotion.

Appellant argues that the District Court erred in dismissing his complaint. He contends that the court had jurisdiction of his cause since the Department of the Army, by denying him his promotion, abrogated his rights of due process. For the reasons stated below, we disagree.

Historically the courts have expressed explicit reluctance to interfere with the management of the Executive Branch of the Government. *See, e.g., Powell* v. *Brannan*, 91 U.S. App. D.C. 16, 17, 196 F.2d 871, 873 (1952); *Bailey* v. *Richardson*, 86 U.S. App. D.C. 248, 182 F.2d 46 (1950), *aff'd*, 341 U.S. 918 (1951); *Friedman* v. *Schwellenbach*, 81 U.S. App. D.C. 365, 368, 159 F.2d 22, 25 (1946), *cert. denied*, 330 U.S. 938 (1947); *Hammond* v. *Hull*, 76 U.S. App. D.C. 301, 303, 131 F.2d 23, 25 (1942), *cert. denied*, 318 U.S. 777 (1943). This marked hesitation to embark into the affairs of a coordinate branch was announced by the Supreme Court as early as *Decatur* v. *Paulding*, 39 U.S. 497, 516 (1840) where the Court stated that "[t]he interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." *See also Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

Although the courts have continually reaffirmed this reluctance, though not always because of ancient precedents,[6] limited intervention has been sanctioned on the grounds of due process to protect the interests of public employees in their employment. *See, e.g., Vitarelli* v.

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[6] *See Adams* v. *Laird*, 136 U.S. App. D.C. 388, 392 n.2, 420 F.2d 230, 234 n.2 (1969), and cases cited therein.

Seaton, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); *cf. Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952). Such intervention principally results from the dismissal of an employee. In cases other than dismissals the courts continue to decry intervention, particularly where promotions are involved. As the Supreme Court stated in *Keim* v. *United States*, 177 U.S. 290, 293 (1900):

> The appointment to an official position in the Government . . . is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore, it is one of those acts over which the courts have not general supervisory power.

Otherwise stated, the courts will "not undertake to pass on a plaintiff's qualifications for any given post, or to compare them with those of an incumbent." *Powell* v. *Brannan*, *supra*, 91 U.S. App. D.C. at 17, 196 F.2d at 873; *see Nash* v. *ICC*, 96 U.S. App. D.C. 203, 204, 225 F.2d 42, 44 (1955), *cert. denied*, 350 U.S. 953 (1956).

It appears clear, and appellant has cited no cases to the contrary, that promotions within the Executive Branch are matters of discretion which necessarily involve the exercise of that discretion. If a court were to intrude into this function, it would "be making an administrative decision. Such action would be a clear usurpation by the judiciary of an administrative function." *Tierney* v. *United States*, 168 Ct. Cl. 77, 80 (1964). The courts, to the best of our knowledge, have never exercised their limited right of review to secure a promotion, the relief requested by appellant, where the Executive Branch has appointed another equally qualified. And indeed, we contend that it should not now be done. *See, e.g., Wienberg* v. *United States*, 425 F.2d 1244, 1251 (Ct. Cl. 1970); *Clinton* v. *United States*, 423

F.2d 1367, 1368 (Ct. Cl. 1970); *Tierney* v. *United States*, *supra*; *cf. Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 138 (1953); *Gearinger* v. *United States*, 412 F.2d 862 (Ct. Cl. 1969); *Boruski* v. *United States*, 155 F. Supp. 320 (Ct. Cl. 1957). Since the courts cannot undertake to secure a promotion for a government employee, the specific relief requested by appellant, the court has no jurisdiction over the subject matter of the complaint. It follows that his complaint was properly dismissed.

II. Appellees did not deny appellant his due process rights, nor did they act arbitrarily and capriciously in denying him a promotion.

Appellant contends that the District Court improperly granted appellees' motion to dismiss, since he has suffered sufficient deviation from procedural regulations in his quest for a promotion to constitute deprivation of his due process rights. Alternatively, he claims that appellees acted arbitrarily and capriciously in denying him a promotion. We maintain, however, that even if this Court were to find that appellant's complaint states a cause of action justiciable in the District Court, the record clearly shows that he received all the rights to which he was entitled.

Appellant, employed as a civilian by the Department of the Army, grade GS-13, sought a promotion to a position within his office to grade GS-14 (App. 2-3). When an *ad hoc* committee, convened to select a list of "best qualified" candidates for referral to the selecting official, omitted appellant's name, appellant filed a grievance pursuant to regulations after another was appointed to the position. The grievance examiner assigned to consider appellant's complaint sustained appellant and submitted his report to the commanding general of the unit. The commanding general sustained the report of the grievance examiner with respect solely to the allegation that appellant's name should have been referred to the selecting official (App. 3-5). The general convened a new *ad hoc*

committee composed of individuals employed in the General Counsel's office, Department of the Army, to prepare a new list for submission to the selecting official. Appellant's name was on the list referred, but again he was not selected (Tr. 4). After the second selection, appellant again sought intervention by the commanding general who determined that there were no grounds to "take issue with the selection determination" (Tr. 5). Prior to the second selection, appellant sought review by the Army Chief of Staff by letter dated October 19, 1967, of the decision of General Besson to sustain the grievance examiner on only one aspect of the grievance (App. 5). The Army General Counsel, by letter dated December 6, 1967, stated that the action taken by General Besson rectified the sole procedural error (App. 5). Thereafter, the Army General Counsel on two occasions again rejected appellant's grievance, and the Civil Service Commission declined to accept jurisdiction (App. 7).

The thrust of appellant's argument, if we understand him correctly, is that General Besson's decision not to sustain the grievance examiner except on one aspect was a decision reviewable by the Chief of Staff of the Army. When appellant received review only from the General Counsel of the Department of the Army, a procedural error was committed which substantially affected his due process rights. Therefore, by the failure of appellees to establish review by the Chief of Staff, appellant was in effect denied due process. We disagree.

Initially we submit that appellant's contention that he was entitled to review by the Chief of Staff is clearly without merit. On October 9, 1967, General Besson sustained the grievance examiner on one point and denied appellant's grievance concerning the remaining aspects. In his letter of reply to appellant, General Besson erroneously advised him that he could seek review of the decision by appealing to the Chief of Staff. This information was incorrect. General Order No. 44, promulgated by the Secretary of the Army on October 4, 1967, specifically provided that review of grievance appeals concerning

promotions of civilian attorneys would be conducted by the General Counsel, Department of the Army.[7] The General Counsel, by letter dated December 6, 1967, in essence affirmed the decision of General Besson by stating that the sole procedural error had been rectified by the convention of a new *ad hoc* committee (App. 5). At that stage appellant had received all the review of his original complaint to which he was entitled by regulation. Additionally, however, he received another review by General Besson, as evidenced by his letter of January 11, 1968, which review under appropriate regulations was also final; *i.e.*, on October 25, 1967, the General Counsel, Department of the Army, implemented General Order No. 44 by providing that appeal to the General Counsel, Army Materiel Command, would be the final step for grievances arising from promotion denials for civilian attorneys within that command. Since appellant admitted at the hearing that the General Counsel did evaluate the grievance for General Besson, appellant was entitled to no further review (Tr. 15-16). In any event, that General Besson's letter of January 11, 1968, constituted final review was evidenced by Secretary Resor's letter of February 19, 1968, in which he stated that the grievance appeal had been returned to the Office of the General Counsel (App. 6). Further, appellant received additional review by the Army General Counsel, who denied his grievance again by letter dated April 4, 1968, even though such review was not available (App. 7). Appellant's claim, therefore, that he did not receive proper review is without substance.

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[7] General Order No. 44, provides in pertinent part:

> [T]he General Counsel is hereby designated the qualifying authority to evaluate the qualifications of persons recommended for . . . promotion as civilian attorneys within the Department of the Army, and to approve or disapprove all such actions. This authority may be redelegated to . . . the General Counsel, Headquarters, Army Materiel Command . . . . He is further authorized to review such proposed actions which adversely affect civilian attorneys as he may consider appropriate.

Even if it were assumed *arguendo* that appellant did not receive review from the proper authority, his claim of violation of his due process rights remains meritless. The judiciary has long adhered to the general principle that government employment is obtained at the will of the appointing officer. *Keim* v. *United States, supra.* Judicial review is normally confined to two determinations: (1) whether there has been substantial compliance with statutory and implementing regulatory requirements, and (2) whether there has been any arbitrary and capricious action by government officials in the performance of their official duties. *Seebach* v. *Cullen,* 338 F.2d 663 (9th Cir. 1964).

In the instant case appellant is alleging that a procedural error occurred, *i.e.*, that he was not granted review of this grievance by the Chief of Staff of the Army. While appellant did receive review of his grievance by the Army General Counsel, which we maintain was proper and sufficient, appellant contends that the failure of appellees to adhere rigidly to their regulations constituted a denial of procedural due process affording him relief. Such is not the standard, however, even for cases involving removal of employees:

> [E]mployee removal and discipline are almost entirely matters of executive agency discretion, and . . . judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation. *Hargett* v. *Summerfield,* 100 U.S. App. D.C. 85, 88, 243 F.2d 29, 32 (1959).

The prerequisite of a *substantial* procedural error has been affirmed in several other government employee discharge cases. The Court of Claims has stated that "[i]t is not every deviation from specified procedure, no matter how technical or regardless of its basic nature, that automatically serves to invalidate a discharge." *Greenway* v.

United States, 163 Ct. Cl. 72, 80 (1963). As the Court of Claims pointed out in a more recent case:

> It is true, as plaintiff contends, that failure by an executive department to comply with its own regulations can invalidate its actions. [Citations omitted.] But all of the above authorities are distinguishable in that they are discharge cases involving *substantial* noncompliance with regulations which greatly prejudiced plaintiffs therein and, in effect, denied them procedural due process. *McCallin* v. *United States*, 180 Ct. Cl. 220, 233-234 (1967).

Appellant maintains that he was denied his due process rights by procedural noncompliance, but we fail to see how his rights were denied when he received review pursuant to General Order No. 44 and review by the Department of the Army. In any event, it is clear that any technical noncompliance was not sufficiently substantial to require judicial intervention.

Appellant also alleges that the action of appellees in denying him his promotion was arbitrary and capricious. We note initially that no evidence to that effect was presented to the District Court. While this Court has recognized arbitrary and capricious action as sufficient grounds to compel judicial intervention, *see Pelicone* v. *Hodges*, 116 U.S. App. D.C. 32, 320 F.2d 754 (1963), certainly appellant should be required to demonstrate the basis for his complaint.

In the instant case appellant has presented no evidence of arbitrary or capricious action, and indeed, he fails to point specifically to that action which he regards as unlawful. The only action which we can discern as the basis for his complaint is that he was in fact denied the promotion he wanted since the selecting officer deemed someone else more deserving of the post. It is difficult to see how such a discretionary action of a government official can serve as a basis for judicial intervention.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF OF APPELLANT, HARRY E. THOMASON

SUPPLEMENTARY STATEMENT OF THE CASE

In view of the matters set forth in appellee's brief, it is felt that the attention of the Court should be invited to certain additional specific matter in the record: Paragraph 5 of the prayers in the complaint (App. 9), which states:

"For such other and further relief as to the Court may seem just and equitable."

COUNTER-ARGUMENT

I

Thomason's Request for Retroactive Promotion Did Not Restrict Other Measures of Relief Open To the District Court

The Government argues that the courts have no jurisdiction to secure a promotion for a government employee; that it therefore follows that the District Court had no jurisdiction over the subject matter and properly dismissed the complaint. We disagree as follows:

1. The District Court in its order of April 3, 1970, merely granted a bare dismissal to the Government. Nothing is indicated therein that the Court believed that it had no jurisdiction over the subject matter (App.11). Nor did the District Court indicate anything more in its order of April 8, 1970, denying Thomason's motion for reconsideration. (App.12).

On the contrary, the District Court, during oral argument on Feb. 27, 1970, seemed mainly concerned as to whether or not Thomason had received his procedural rights, (App.13-18). The entire argument, or almost the entire argument, was taken up with the latter question.

It must therefore follow that the subject-matter was (a) whether Thomason received his proper procedural rights, and (b) whether the Government was arbitrary and capricious. Our prayer for promotion, was just that, a prayer. It was not the subject matter; it was relief that we sought in the event the Court held favorably for us on the above-stated subject matter.

2. The District Court by Thomason's prayer for promotion, was not restricted to granting only that relief. Under paragraph #5 of our complaint (App.9), appellant indicated in effect, that if he was not granted the relief he requested of promotion, that he be given ". . . such other and further relief as to the Court may seem just and equitable." The District Court did have the authority to grant such other relief.

Such other relief could have consisted of remanding the matter back to the agency to permit Thomason to obtain the procedures which he contended, had been denied him. These procedures had they been granted, would have permitted him to appeal to the Department of the Army's Chief of Staff, and the adjunct procedures to which he was entitled under the agency's Grievance regulations, (App.25).

Furthermore, the Court could also have found the appellees as having been arbitrary and capricious in such matters as: (1) In General Besson's overruling of the recommendations and findings of his own-appointed Grievance Examiner without giving reasons for the same, (App.23), in violation of of CPR E2.3-3c, Grievance Procedures (App.25); (2) In General Besson's inordinate delay of almost three months before his decision of October 9, 1967, after his Grievance Examiner had submitted his report, findings and recommendations on July 14, 1967 (App.19), in violation of the tenor and spirit of promptness in the Grievance Procedures; (3) In General Besson's notice to Thomason in his decision letter of Oct. 9, 1967 (App.23) that Thomason could appeal to the Army Chief of Staff, and

his subsequent denial of such right of appeal; (4) In the General's re-convening of an ad hoc committee, an act in opposition of Thomason's right of appeal; (5) In General Besson's notice of re-convening in the decision letter of Oct. 9, 1967 (App.23), before Thomason had a chance to appeal by his letter of October 19, 1967 (Supp.App. 1-9) to the Army Chief of Staff; (6) In the promulgation of the new General Orders No. 44 (App.22) dated Oct. 4, 1967, 5 days before General Besson's decision of Oct. 9, 1967, which was in the nature of an ex post facto law, and which unfairly took advantage of the inordinate delay of decision by General Besson; (7) And in other areas, as appellant indicated in his letter of appeal to the Chief of Staff (Supp. App. 1-9).

If, and in the event the Court had found any of the foregoing, as being arbitrary and capricious, it could also have remanded the matter back to the agency, to have further proceedings omitting the arbitrary and capricious handling. This too therefore, would have been a form of relief open to the District Court, if it had chosen to grant such relief.

3. The mere mention that this cause is involved in an action involving a promotion, does not necessarily render it untouchable. In the case of Cominsky v. Rice, 223 F.Supp 190, 191, 192 (1964), where a naval shipyard employee claimed that he had been improperly passed over for promotion, the Court agreed that it could not undertake to passon qualifications, but, it went on to say, that,

". . . Where there has been a substantial departure from applicable procedures, a misconstruction of governing

"legislation, or like error going to the heart of the administrative determination, a measure of judicial relief may on occasion be obtainable."

Furthermore, appellant in his Memorandum of Points and Authorities In Opposition to Defendants' Motion to Dismiss, in the District Court, in pertinent part stated that,

"Plaintiff . . . is not asking this Court to determine 'whether plaintiff or Mr. Gibson is best suited for a particular position in AMC.' (D's memo, page 1). All plaintiff is asking the Court to do is to determine whether or not procedures to which he was entitled were violated by the defendants and/or whether defendants were arbitrary and capricious. Plaintiff is saying that such violations did occur and such arbitrary and capricious acts did take place which had the effect of denying him this promotion."

And so we repeat here.

Appellant was also faced in the District Court with the same objection that the Government raises here, that Mr. Thomason wants the Court to promote him. Again in our said Memorandum of Points and Authorities, supra, we stated that

"Contrary to what defendants charge, plaintiff has not restricted his relief to only 'a judgment directing defendants to promote him forthwith' (page 1 of defendants' memorandum). . . "

And so we repeat here, and as we have stated supra.

The Government has cited Keim v. United States, 177 U.S. 290, 293 (1900), as a case it chiefly relies upon, just as it did in the District Court. However the Keim case was decided 12 years before the Lloyd-LaFollette Act of 1912, when employees were little more than chattels; they held their jobs at the pleasure, caprice and whim of their superiors. That case is hardly a criterion because the said Act put a stop to such arbitrary authority. In their citation of Powell v. Brannan, 91 U.S. App. D.C., 16, 17, 196 F.2d 871, 873 (1952), the Court there after

determining that there was no arbitrary and capricious conduct or procedural violation, went on to state, that had there been,

> ". . . a departure from applicable procedures. . . a measure of relief. . . "

could have been obtained.

Most of the Government's citations, are either irrelevant (such as concerning Armed Services cases) or repetitive of the dicta of the Keim case, supra. In the great majority of those cited cases, the Courts have always indicated that if procedural violations or arbitrary and capricious conduct could be shown, the Courts would give a measure of relief.

The area of discretion of government officials, is by no means absolute, as the Supreme Court held in Service v. Dulles, 354 U.S. 363 (1957), when it said that:

> ". . . regulations validly prescribed by a government administrator are binding upon him as well as the citizen and that this principle holds even when the administrative action under review is discretionary in nature."

The Supreme Court also said pertinently in Vitarelli v. Seaton, 359 U.S. 535 (1959), that

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged."

See also U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260.

This Court's holding in Schachtman v. Dulles, 96 U.S. App. D.C. 287 (1955), is particularly applicable here because it said there that:

> ". . . discretionary power does not carry with it the right to its arbitrary exercise."

In Norton v. Macy, 135 U.S. App. D.C.214 (1969), this Court held that although the Government employer,

". . . enjoys a wide discretion . . . it is also true that this discretion is not unlimited. . . The Government's obligation to accord due process sets at least minimal substantive limits. . . ".

See also Zucker v. Baer, 247 F.Supp.790 (1965); Daub v. U.S., 223 F.Supp 609 (1963); O'Boyle v. Coe, 155 F.Supp 581 (1957); Coldanchise v. Macy 265 F.Supp.154 (1967).

II

The Government denied Thomason his Rights of Due Process and by Their Arbitrary and Capricious Actions, In Effect Denied him A Promotion

When General Besson overruled the Grievance Examiner's Findings and Recommendations, and advised Mr. Thomason that he was going to re-convene the ad hoc committee, he committed a number of arbitrary and capricious acts. See his letter of decision of Oct. 9, 1967 (App. 23). These were as follows:

1. He gave no reasons for overruling so many of the Grievance Examiner's findings and recommendations. In one aspect, regarding the finding of bias against Mr. Thomason by the ad hoc committee, General Besson merely stated that it was only an "expression of the grievance examiner's opinion", and overruled the finding, (App. 23). Under CPR E2.3-3c (App. 25), the Grievance Procedures under which Mr. Thomason had had to use, the following is stated in pertinent part:

"c. The commanding officer's decision on the grievance will be furnished the employee in writing. It will include a statement of the reasons for the decision and will include a copy . . . " (emphasis added).

We maintain that this summary overruling of the Examiner's findings and recommendations was an arbitrary and capricious act.

We also maintain that General Besson's failure to give reasons for such summary overrulings, was a violation of appellant's procedural rights, and thus a violation of rights of due process.

2. When General Besson stated that he had

> ". . . directed the General Counsel to reconvene the Ad Hoc Committee for the purpose of preparing a new list of candidates . . .",

he committed an arbitrary and capricious act. As we have constantly stated, Mr. Thomason had a right of appeal to the Army Chief of Staff. In addition General Besson told him that in the last paragraph of the said letter. This meant therefore that Mr. Thomason had a right of appeal before any action inimical to that right was taken. This order of re-convening, was inimical to that right and thus arbitrary and capricious.

3. When General Besson waited until October 9, 1967 to render his decision upon findings and recommendations submitted to him by his own-appointed Grievance Examiner on July 14, 1967 (App. 19), he committed an arbitrary and capricious act. The tenor and spirit of the grievance procedures as well as the text, requires promptness. In the Army's Civilian Personnel Regulations CPR E2 "Grievance and Appeal Procedures", it is stated in Section 1-1b, the following:

> "b. The policy of the Department of the Army is that all employees . . . have a right to present their grievances and appeals to appropriate management officials for prompt consideration and equitable decision . . . " (Emphasis added)

When the Department of the Army promulgated General Orders No. 44 on October 4, 1967 (App. 22) only five days before General Besson's decision letter of October 9, 1967 (App. 23), it committed an arbitrary and capricious act. It committed such an

act because it took advantage of the long delay in decision, i.e., almost three months, to change the avenues of appeal and determination against Thomason. It was in the nature of an ex post facto law and was palpably unfair and inequitable. It also violated appellant's procedural rights as well, because again quoting CPR E2, 1-1b, in more pertinent form here, it stated that:

> "b. The policy of the Department of the Army is that all employees will be treated <u>fairly and equitably</u> in all respects . . . ". (Emphasis added).

It was the promulgation of these General Orders #44, which was the real basis for the District Court's dismissing our complaint, as a reading of the transcript of oral argument will reveal. Judge Corcoran who presided at said argument insisted that we had had our appeal to the Chief of Staff, because under G.O. #44, allegedly the Chief of Staff had delegated his review authority back to the General Counsel of the Army Materiel Command, (App. 13thru 18).

If such a result would have pertained as Judge Corcoran believed, then it had been folly and a waste of time and effort on the part of Mr. Thomason, to have made his appeal to the Chief of Staff on October 19, 1967 (Supp. App. 1-9). If such a result would have pertained, then Mr. Thomason was never entitled to the appointment of a Grievance Examiner, and indeed had no right of grievance at all. We say this because Mr. Thomason could only obtain equity outside of the realm of the Army Materiel Command's General Counsel, and under Judge Corcoran's interpretation, that was the only place Thomason could have gone.

We refer this Honorable Court to the following colloquy between Thomason's counsel and Judge Corcoran (App. 18):

"The Court: Well, you had the review by the Chief of Staff.
Mr. Sherwood: When:
The Court: He simply delegated his authority to the General Counsel.
Mr. Sherwood: We never got to the Chief of Staff . . .
The Court: You got to the General Counsel. . . ".

The holding by the District Court, has therefore under General Orders No. 44, reduced the rights of anyone applying or seeking an attorney's jobs, or anyone who is aggrieved in the course of such seeking and applying, as Mr. Thomason was, to seeking relief only up to the General Counsel of that particular command. In other words Mr. Thomason should never have been permitted to write a letter of appeal to General Besson.

We believe, that the ruling of Judge Corcoran, even under General Orders No. 44, is wrong. However, what we are maintaining here, as the promulgation of General Orders No. 44, whatever way one wishes to interpret them, should not be given any pertinence to our cause. It's promulgation only 5 days before General Besson's Oct. 19, 1967 letter, was most unfair and most inequitable. It smacks greatly of the unfairness in Camero v. U.S. 375 F.2d (1967, as well as in Knotts v. U.S. 128 Ct.Cl;121 F.Supp. 630 (1954) and Kelly v. U.S. 138 F. Supp 244, 133 Ct. Cl. 571 (1956).

CONCLUSION

Wherefore appellant respectfully submits that the judgment of the District Court should be reversed

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Attorney for Appellant

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Office of the General Councel
Patents Law Division
Army Materiel Command
Washington, D. C., 20315

October 19, 1967

O: Chief of Staff
U. S. Army
ATTN: DCSPER, OCP
Department of Army
Washington, D. C., 20310

HRU: Mr. Edward J. Kelly
Mr. Harry M. Saragovitz
Mr. Kendall M. Barnes
General Frank S. Besson, Jr.

UBJECT: Request for Review of Letter of Decision - Grievance Under CFR E2

Review of the Letter of Decision in this case, dated Oct. 9, 1967, is espectfully requested. The Grievant, Mr. Harry E. Thomason, by this appeal s seeking to preserve inviolate the integrity and findings of the Grievance Examiner.

The Ad Hoc Committee which prepared the lists of "best qualified" andidates for promotion to the position in question failed to prepare coper records. Important evidence pertaining to the subject matter of this rievance was suppressed. Evidence was destroyed. The record was tampered ith, doctored, and added to, after the position was filled. These acts ccured in two different attempts to justify the selection of the favored ndidate. Further, the Letter of Decision was delayed eighty seven days, hree times the normal length of time.

More specifically, as to paragraph 2, of the Letter of Decision, the etermination that there was "a" procedural error in the establishment of he list of candidates appears to be an understatement. The Grievance xaminer's Report of Inquiry lists about a dozen procedural errors and regularities plus about a dozen substantive errors. These are found in he Grievance Examiner's Report of Inquiry at page 1; c.: page 2; e., (1),

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(2) and (3),: page 3; (3), (a), 1, 2, 3, 4,: page 4; (5), (a),: page 5: (b), also a., [redacted], (2), (3), (4),: page 6; (5), (6), (7): page 7; a. (2). (Some of the approximately twenty listed errors are both procedural and substantive in nature.)

4. As to paragraph 4, of the Letter of Decision, the determination that unfavorable bias was not substantiated as fact is believed to be contrary to the weight of the evidence and is contrary to the findings of the impartial Grievance Examiner, who was specially trained, and appointed by the Department of the Army, to make such investigations and prepare such reports. His Report of Inquiry refers to the prejudice (bias) of Mr. McKenna and Mr. Kelly at many places as follows.

a. Prejudice of Mr. McKenna, Chairman of the Ad Hoc Committee, against Grievant, is referred to at three places, (see page 5; (b): page 6; (7): and page 7; b. (1)).

b. Prejudice of Mr. Edward J. Kelly, the appointing official, to favor his close friend Mr. Robert P. Gibson.

1. Mr. Gibson was not required to meet the major requirement of the Job Description, that he have a good, up-to-date working knowledge and experience in Patents Prosecution work, (see top of page 6, "Issue and Fact" No. (5)). Mr. Gibson was transferred from "Claims" work, having had relatively little actual patents prosecution experience. Mr. Kelly, by his own statement, emphasized that Mr. Gibson had had no patents Prosecution experience for four or five years, during the entire life of the Army Materiel Command, (see page 3; (3), (a), 4, and page 6; Fact No. (5)).

2. The position was not advertised as was customary, and Grievant, a prospective candidate, was never told that the position was open. Contrary to Mr. Kelly's statement to the Grievance Examiner, it was found

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that other "attorney vacancies in Headquarters, AMC were advertised" in Impact, (see Report of Inquiry: page 3; (3), (a), 1).

3. When he originally appointed Mr. Gibson on March 12, Mr. Kelly advised the Ad Hoc Committee that the candidate should be a member of the Bar of the CCPA. (Mr. Gibson was a member, Thomason had not paid his $10 and applied for membership.) This supposed "requirement" was not made known to Thomason prior to the appointment. After Thomason's complaint aborted the first appointment of Mr. Gibson, and Thomason became a member of the Bar of the CCPA, this fictitious "requirement" was removed. However, another fictitious/non-essential, self-serving "requirement" was added, to favor Mr. Gibson, by an addition to the record, which, according to the Grievance Examiner, came into the record by an un-dated DF after Mr. Gibson was appointed, (see "Fact" No. (4), page 5). The DF called for a chemical man. Mr. Kelly stated to the Grievance Examiner that he wanted a "chemical" man. He knew that his close friend of (10) years in the Chemical Corps was the only one available to fit that fictitious requirement. By adding another Chemically trained man he thereby filled half of the professional positions of Patents Prosecution Branch with "chemical" men. AMC patents prosecution work includes only about 20% to 25% chemical cases. (Many of these are quasi-chemical in nature and are assigned to Dr. Thomason for prosecution. Thomason had two years of study in chemistry, plus physics and other sciences and engineering.) Mr. Kelly, by appointing Mr. Gibson, stacked all top positions in the Patents Prosecution Branch with "chemical" men; Chief, Mr. Kelly, Assistant Chiefs, Mr. Gibson and Mr. Berl, (see the Grievance Examiner's Report, page 3; (3), (a), 3 and 5). Also note the Grievance Examiner's "FINDINGS:": page 7; b. (2), which state, "It must be assumed - - - (that the fictitious Chemistry discipline) - - - was

established by the supervisor", Mr. Kelly, (emphasis added). The Grievance Examiner reports that "Only one person, the successful candidate, had evidence of a Chemistry background - - - although grievant had a degree in physics". IT SHOULD BE EMPHASIZED THAT the Grievance Examiner found that this fictitious requirement of chemistry entered the record only "in the review" after the appointment of Mr. Gibson, in an undated DF, from the Chairman of the Ad Hoc Committee, [redacted] This suppressed the evidence as to just when and why the record was doctored and added to on this point, (see page 7; b. (2): page 5; Fact No. (4): and page 2; e. (3)).

c. Prejudice of Mr. Edward J. Kelly against Dr. Thomason.

1. The Job Description and requirements were denied to Grievant just prior to the first appointment of Mr. Gibson. Thus, Grievant had no way of knowing he should fulfil a fictitious requirement of joining the Bar of the CCPA. Mr. Kelly alleged that he did not know that Job Descriptions were in existence until after he had appointed Mr. Gibson, (see Examiner's Report: page 3; (3), (a), 2.). Could a GS-15 Supervisor, appointing a man to a GS-14 position, fail to know that there was a Job Description for the position he was filling?

2. Similar to 1 above, the positions were not advertised in the customary manner, in "Impact," so that Thomason could know the position was open and ascertain that his credentials were in order, (see Report of Inquiry: page 3; (3), (a), 1.).

3. The impartial Grievance Examiner, after a very thorough and painstaking investigation, could find no substantial deficiency or derogatory material against Thomason. This included interrogations of Mr. Kelly himself, Mr. Wallace Hicks of AMC Personnel Division, and six of Thomason's co-workers. To the contrary, the Examiner found, and

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Mr. Kelly stated, that Thomason's work "is in the top portion as to number of cases successfully prosecuted": (page 4; 7). Also, the Examiner found as a "Fact:" in regard to Thomason's work that "job requirements are being fulfilled to everyone's satisfaction", (emphasis added), (see page 6; Issue and Fact No. 8). In order to bypass Dr. Thomason, who had twenty years of patent experience, and reach his close friend with only thirteen years of experience, very little of it in Patents Prosecution work, Mr. Kelly, the record shows, resorted to many prejudicial acts for Mr. Gibson and against Thomason.

5. The Ad Hoc Committee failed to keep proper records, if any at all, when it was originally convened. Thus, evidence as to why Thomason was not on the original list of "best qualified" candidates was not made available to those having a need to know. Then the Ad Hoc Committee destroyed evidence, destroyed the record, the working papers prepared at the second convening of the Committee, (page 4, (5), (a)). This record must have shown why Thomason allegedly "does not meet criteria". The impartial Grievance Examiner, after a thorough, painstaking examination, could find no evidence that Thomason does not meet the legitimate criteria set up by the Ad Hoc Committee, (see page 6; Issue and Fact No. (8): and page 4; Mr. Kelly's statement, No. 7).

6. In summary, the record, it is submitted, supports a finding that, instead of "a" procedural error there were numerous procedural errors and irregularities plus numerous errors of a substantive nature, (some errors being procedural and also going to the merits). Further, the record, it is submitted, supports a finding that there was prejudice and bias, on the part of Mr. McKenna and Mr. Kelly, and that this prejudice was double-edged, to favor Mr. Gibson and to disfavor Thomason.

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7. The prejudice and bias, it is submitted, were so pronounced that:

a. Fictitious "requirements" were used, on both occasions of appointing Mr. Gibson;

b. Evidence was suppressed;

c. Evidence was destroyed;

d. The record was doctored as pointed out in the Report of Inquiry; (Grievant has reason to believe that some of the doctoring was not discovered

e. The Letter of Decision was delayed for three times the normal time while the errors were perpetuated;

f. Contrary to Army Policy, Grievant has been subjected to harassment, intimidation and recrimination since he filed a grievance, as set out below. If the Letter of Decision were allowed to stand, unchallenged and uncorrected those who suppressed and destroyed evidence, doctored the record, and delayed the Letter of Decision for three months, would be rewarded for their efforts and encouraged to continue to engage in such practices to <u>flout the Civil Service Merit Promotion System</u>. Prejudiced men could continue to sit in positions of judgement and public trust and continue to exercise that judgement with prejudice for those they like and against those they dislike. The impartial, skilled Grievance Examiner's integrity and findings should be preserved and implemented by action.

8. Indeed, since Dr. Thomason filed this grievance he has been the subject of repeated harassment, intimidation and recrimination by his supervisors. After ten of such incidents his AFGE union representative, and his private attorney, found it advisable to lodge protests against such tactics in attempts to get the supervisory personnel to abide by the "Policy" of the Department of the Army, CPR E2, 1-1. b. which states; "In exercising this right, (to file an Employee Grievance) the employee - - will be unimpeded

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and free from restraint, coercion, discrimination or reprisal."

9. Procedure outlined in AMCR-690-3, C 38, 3-4, f. requires that the Ad Hoc Committee be chaired by the Assistant General Councel for Procurement Law, Mr. Francis X. McKenna. His opinions likely would be influenced by the appointing official, Mr. Kelly. The evidence tends to show that this already has happened twice as Mr. Gibson was appointed and then re-appointed. At the meeting of the Ad Hoc Committee prior to the original appointment of Mr. Gibson on March 12, the Ad Hoc Committee apparently made no records, and thereby suppressed the evidence as to why Thomason was not listed as one of the "best qualified." This highly irregular and improper procedure was challenged and the appointment was held up. After the second meeting of the Ad Hoc Committee the Committee, by its own admission, destroyed the basic record, thereby destroying the evidence and making it impossible for the Grievance Examiner, Grievant, and all concerned to examine the record for clues to prejudice. Failure to find prejudice as a fact could encourage Mr. McKenna, and Mr. Kelly, to engage again in the practices which brought on filing of the present Grievance. Although Mr. Kendall Barnes has orally indicated that an effort will be made to obtain unprejudiced members for the new Ad Hoc Committee, he was not certain that could be done. Also, it would overlook the apparent double-edged prejudice of Mr. Kelly, the appointing official who will be making the final selection for the new appointment.

10. Paragraph 3 of the Letter of Decision declines to cancel the actions taken in filling job number 4202, as requested by Grievant and recommended by the Grievance Examiner, until the case has been reprocessed from the point at which "the error" was made. At no place does the Letter of Decision seem to pinpoint the acknowledged error, either as to the date

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of the error or as to which of the many errors was the magic one. It is submitted that the entire proceding reeks with errors, prejudices, irregular procedures, doctored records and so on as found by the impartial Grievance Examiner, and which have come to light since his Report of Inquiry was filed. These improper and illegal actions began prior to the appointment of Mr. Gibson to the position on March 12 and thereby vitiated the entire proceding and appointment. Now, more than seven months later, the poisoned tree continues to bear fruit. There appears to be no justification for perpetuating the erroneous appointment to job No. 4202.

11. The remedial action sought is:

a. Confirmation of the finding that prejudice and unfavorable bias existed against Thomason and for Mr. Gibson, both as to Mr. McKenna and Mr. Kelly;

b. Clarification of the Letter of Decision to acknowledge the numerous errors found by the Grievance Examiner, this to replace the indefinite finding of "a" procedural error;

c. Confirmation of the finding that the Ad Hoc Committee and supervisory personnel failed to prepare and keep proper records;

d. Confirmation of the finding that fictitious criteria and requirements were used in filling the position, with the major job duty (patent prosecution experience) having been waived or substantially ignored for Mr. Gibson;

e. Confirmation of the finding that the record was doctored on the several occasions referred to by the Grievance Examiner;

f. Cancellation of the erroneous appointment to job No. 4202 as suggested by the Grievance Examiner;

g. Such other relief as the reviewing authorities may, in their

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discretion, deem appropriate and equitable to promote the Civil Service Merit Promotion System and to uphold the policy and integrity of the Grievance Procedure of the Department of the Army.

Harry E. Thomason

Harry E. Thomason, J. D.

HET/hdt